IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 205.

SCHENLEY INDUSTRIES, INC.,

Petitioner,

vs.

PAX LIND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONER.

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Petitioner,

vs.

DAN LIND,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF PETITIONER.

Statement.

Petitioner, since the submission of the Petition for Certiorari, has located additional cases evidencing the conflict between the decisions of the Court of Appeals for the Third Circuit, and decisions rendered by other circuit courts concerning the interpretation of Rule 50(b) of The Federal Rules of Civil Procedure which should be brought to the attention of this Court.

Despite the fact that the propriety of the action of the Court of Appeals for the Third Circuit in setting aside the alternative order of the trial court granting a new trial is dealt with in the first point on pages 8 through 11 of the Petition for Certiorari, Respondent has indicated his belief that Petitioner has not raised this question.

Because of Respondent's action, Petitioner has also dealt a bit more extensively in this Reply Brief with the trial judges' historic role in awarding a new trial and the limitations on this imposed by the Third Circuit in this case.

Respondent's contention that Petitioner may not raise the question of jurisdiction at this time is without merit and we feel that our analysis of his cases will so demonstrate.

REASONS FOR GRANTING WRIT.

I. The interpretation of Rule 50(b) is contrary to decisions of this Court and other circuit courts of appeal.

As has previously been shown in the Petition for Certiorari, a direct conflict exists in the interpretation of the operation of Rule 50(b) of the Federal Rules of Civil Procedure between decisions of the Court of Appeals of the Third Circuit and the Court of Appeals of the Second, Sixth and Ninth Circuits (Petition, pages 8, 16 and 17). It has further been shown that, indeed, a conflict exists within the Third Circuit itself (Petition, page 11).

The assumption of jurisdiction by the Court of Appeals to review an order of the trial court granting a new trial, even though it be coupled with a final judgment n.o.v., is contrary to the decisions of other courts of appeal.

In *Koppal* vs. *Transcontinental and Western Air, Inc.*, 199 Fed. 2d 117 (8th Cir. 1952), Rev'd on other grounds, 345 U. S. 653, 73 Sup. Ct. 906 (1953), the situation was essentially similar to that presented here.

There, after the jury returned a verdict for the Plaintiff, the Court, on motion of the Defendant for Judgment n.o.v., or in the alternative for a new trial, entered an

order setting aside the verdict, giving judgment for the defendant, and further providing that if the judgment was reversed on appeal, the defendant be granted a new trial unless the plaintiff filed a remittitur directing the entry of judgment in a lower amount than the jury verdict. The plaintiff appealed. Upon review, the Court of Appeals held that the judgment n.o.v. must be reversed and stated that the granting of a new trial was not as such a reviewable order. It therefore declined to express its views on the correctness of the trial judges' action.

From the above, it is manifest that the court treated each aspect of the motion as a separate and distinct application. To that part of the motion dealing with judgment n.o.v., certain criteria applied. As to that part dealing with a new trial, the court determined it was powerless to review at that stage of the proceedings.

The right of appeal does not come from Rule 50(b). This rule neither purports nor undertakes to define or change the scope of appellate jurisdiction. The fact that the alternative grant of a new trial may be entered at the same time as a final judgment does not deprive the order pertaining to the new trial of its interlocutory nature. The two remedies are historically separate and distinct and the rules of law applicable to them reflect this.

The fact that the distinctions in the various procedural alternatives must be preserved is emphasized in *Morsh* vs. *Illinois Central Railroad Co.*, 175 Fed. 2d 498 (5th Cir. 1949). Judge Sibley speaks of the necessity of maintaining the distinctions on page 500, where it is said:

> "A motion for a directed verdict, or for a judgment notwithstanding the verdict under Rule of Civil Procedure 50, 28 U. S. C. A., raises a question of law only: Whether there is any evidence which, if believed, would authorize a verdict against movant.

> The trial judge in considering those motions does not exercise discretion, but makes a ruling of law, and if he errs the appellate court may reverse. A motion for new trial is addressed to the trial judge's discretion. He may grant a new trial if he thinks he has committed error; and he may grant one (and he alone can) because he thinks the verdict is wrong, though supported by some evidence. The exercise of his discretion is not ordinarily reviewable on appeal, though a failure to exercise discretion, or an abuse of it, may be corrected. The motion for a new trial is entirely independent of the other two motions and is governed by different principles, and has a different result. It never supersedes the jury, but as its name states, it results in another jury trial, perhaps with different evidence produced. But the motion for directed verdict or for judgment notwithstanding the verdict if granted, ends the case.
>
> "Rule of Civil Procedure 50, while altering the procedure in federal courts, did not alter the nature and effect of these motions, and each is entitled to be decided according to the principles applicable to it without confusing them. Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 61 S. Ct. 189, 85 L. Ed. 147."

The position of the 8th Circuit was re-examined and clarified in 1958. In *Gallon* vs. *Lloyd-Thomas Company*, 261 Fed. 2d 26 (8th Cir. 1958) a suit was instituted for rescission of a contract of employment and the defendant employer counterclaimed. The jury returned a verdict in favor of the plaintiff on each of the five counts of his complaint, and found against the defendant on his counterclaim.

After trial, on motion, the court entered judgment n.o.v. for the defendant on two counts of the complaint and further, as to the entire five counts, granted a new trial.

As to the two counts where judgment n.o.v. had been previously granted, the new trial was conditioned upon reversal of this judgment upon appeal. In addition, the defendant was granted a new trial as to the counterclaim.

The plaintiff appealed from the order granting the judgment n.o.v. and the new trial in the alternative on the two counts, and also from the order granting a new trial on the remaining three counts. Judge Mathes' opinion stated the matter clearly:

> "At the outset, we raise, *sua sponte*, the question of our jurisdiction to entertain this appeal. For impelling legal reasons, which we shall presently point out, we are driven to the conclusion that the case is not properly before us, and jurisdiction remains in the trial court.
>
> "The after-trial action by the court did not finally dispose of all of the issues so as to constitute a final decision within the meaning of Title 28 U. S. C. A. 1291, which provides that courts of appeal shall have jurisdiction of appeals from all *final* decisions of the district courts. As we have seen, defendant's motion for judgment notwithstanding the verdict was sustained as to Counts I and IX, and judgment rendered accordingly. But, as to the three remaining counts upon which plaintiff had prevailed, and defendant's counterclaim, the Court directed a new trial.
>
> "It is a firmly entrenched principle of federal jurisprudence that a motion for new trial is directed to the sound discretion of the trial court. Stofer *v.* Montgomery Ward & Co., 8 Cir., 249 F. 2d 285, 288; Agnew *v.* Cox, 8 Cir., 254 F. 2d 263, 267-268; Hobart *v.* O'Brien, 1 Cir., 243 F. 2d 735, 744, certiorari denied 355 U. S. 830, 78 S. Ct. 42, 2 L. Ed. 2d 42, rehearing denied 355 U. S. 879, 78 S. Ct. 139, 1 L. Ed. 2d 110; Phoenix Indemnity Co. *v.* Gironard, 5 Cir., 252 F. 2d 146, 148, and the granting or denial of a

> new trial is not an appealable order. In Buder *v.* Fiske, 8 Cir., 174 F. 2d 269, at page 265, modified 177 F. 2d 907, this Court, in so holding, stated: 'Such determination may be challenged—on the ground of abuse of discretion—in an appeal from the *final judgment*. Marshall's U. S. Auto Supply, Inc. *v.* Cashman, 10 Cir., 111 F. 2d 140, 141.' * * *"

It should be pointed out to the Court at this time that there are apparently two factors limiting the exercise of the power of review by the Appellate Courts.

The first is jurisdictional and stems from the limitations imposed by Title 28, Sections 1291 and 1292, which confine appellate jurisdiction to final decisions and certain specified interlocutory orders. Under this limitation, orders *granting* new trials may not be reviewed, even for abuse of discretion, until after the rendition of final judgment in the second trial. *Koppal* vs. *Transcontinental and Western Air, Inc., supra; Gallon* vs. *Lloyd-Thomas Company, supra.* On the other hand, orders *denying* a new trial, where a final judgment is entered contemporaneously, may be appealed at this stage since this constitutes a final disposition of the matter. *Commercial Credit Corp., v. Pepper*, 187 Fed. 2d 71 (5th Cir. 1951).

The second is a limitation imposed by the Appellate Courts upon themselves arising, perhaps, out of the Judiciary Act of 1789 or resting on that part of the Seventh Amendment which provides that no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law. This limitation, however, does not extend to instances where the trial court has been guilty of an abuse of discretion. It is applicable only to instances where review of the granting or denial of a new trial is sought on the alleged ground that the trial court made erroneous findings of fact and

includes determinations concerning the weight of the evidence. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 53 S. Ct. 252 (1933); *U. S.* v. *Johnson*, 327 U. S. 106, 66 S. Ct. 464 (1946). Where review is sought for error of law, the limitation does not apply. It does, however, apply equally as well where an appeal is taken from a judgment and order *denying* a new trial in the first instance as where an appeal from the judgment and order granting *a new trial* is taken after the entry of judgment in the second trial. *Portman* vs. *American Home Products Corp.*, 201 F. 2d 847 (2nd Cir. 1953).

The case of *Pettingill* v. *Fuller* (1939) 107 F. 2d 933, cited by Respondent on p. 3 of his brief, is an instance of the practice outlined above, where the Court granted review of an order granting a new trial after the entry of final judgment in the second trial. On p. 936 the Court expressly states:

> "The question whether an order granting or denying a motion for a new trial may be reviewed on appeal when not followed by a final judgment entered after a new trial is not involved in the case at bar. Here we are reviewing an interlocutory order after final judgment in the action."

The case of *Kanatzar* v. *Chrysler Corp.*, 195 F. 2d 104 (10 Cir. 1952) cited by Respondent on p. 6 his brief is in complete accord with the position of Petitioner. This was an attempt to review an order granting a new trial. The Court expressly held that such an order was not appealable. It outlines in its opinion the types of orders which are appealable in Section 1292 of Title 28. And hence when in its concluding sentence the Court makes the statement quoted by Respondent that an order granting a new trial "is open to review through regular channels only on appeal from a final judgment subsequently entered or on appeal from

an appealable order" it was unquestionably referring to those interlocutory orders enumerated under Section 1292.

There is no authority in the cases for the statement of Professor Moore quoted on p. 5 of Respondent's brief; rather it is a conclusion from a statement appearing on p. 3896 of the same volume to the effect that an order for a new trial, unless conditional, destroys the finality of a judgment n. o. v. But on a logical basis the converse should also be true. A final judgment n. o. v. does not destroy the interlocutory nature of a conditional order for a new trial.

Furthermore on practical grounds, to permit an appeal in the initial stage would be premature, since the aggrieved party might prevail on the second trial and obviate the necessity of the Appellate Court considering the question at all.

It has come to our attention since filing our Petition that this Court, in addition to refusing to accept the amendment to Rule 50(b) made by the Advisory Committee on the Rules of Civil Procedure in 1946, resisted another attempt to permit the Appellate Courts to invade the power of the trial judge to grant a new trial made in the proposed amendment to the rules which was submitted under date of October, 1955. The proposed change to Rule 50 which was rejected by the Court was the following:

> *"(c) Same; Conditional Rulings on Grant of Motion.*
> *"(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed. If the motion for new trial is thus conditionally granted, the court shall specify the grounds therefor, and such an order does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is*

reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In case the motion for new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court." U. S. Code Cong. & Ad. News (1956) Vol. 3, page 5175.

The repeated rebuffs given by this Court to attempts thus to derogate from the power of the trial judge to grant new trials indicate that in doing so this Court had in mind the limitations imposed on the appellate jurisdiction by Section 1291 and the policy of confining appellate review referred to above. However, we submit that the confusion which has continued to persist among the Circuit Courts of Appeal and the members of the Bar on this subject, as evidenced by the court's conflicting decisions and the continued attempts of the Advisory Committees to extend the purview of Rule 50 beyond the limits which the statute and the policy of the Appellate Courts impose should be clarified by this Court. As it holds the prime responsibility for the proper functioning of the Federal judiciary, and since, in the past, this Court has accepted for review cases involving interpretation of the Federal Rules of Civil Procedure, Petitioner respectfully submits that a case is again at hand where certiorari should be granted.

II. A Question as to the existence of Jurisdiction of the subject matter may properly be raised for the first time at this juncture of the case.

The question Petitioner raises is that of the existence of jurisdiction over the subject matter as opposed to jurisdiction of the person. This involves the fundamental power of a court to hear and decide a cause on its merits and, as such, may not be conferred upon it by the litigants by either

consent or waiver. *In re Martinez*, 241 F. 2d 345 (10th Cir., 1957); *Rensing* v. *Turner Aviation Corp.*, 166 F. Supp. 790 (D. C. Ill., 1958). This being so, a question as to the existence of such power may be raised at any time.

The nature of this type of jurisdiction is such that even if the litigants fail to raise the question, this Court is obliged to do so by virtue of the nature and limits of the judicial power of the United States. Thus, this Court should not only satisfy itself of its own jurisdiction, but also review and satisfy itself as to the jurisdiction of the court from which the appeal comes.

As is said in *Mansfield C & L. M. R. R. Co.* v. *Swan*, 111 U. S. 382, 4 S. Ct. 510 (1884):

> "(T)he first and fundamental question is that of jurisdiction—first of this court and then of the court from which the record comes."

The case of *King Iron Bridge & Manufacturing Co.* v. *Otoe County*, 7 S. Ct. 552, 120 U. S. 225 (1887) reversing 27 F. 800 (8th Cir. 1886) is also cited in support of this proposition.

It is respectfully submitted that the cases cited by Respondent, when closely examined, lend little if any support to his contention that this jurisdictional question may not be raised at this time. In only one of the cases cited by him is the question of jurisdiction over the subject matter raised in the first instance in this Court. *Gibbs* v. *Harris*, 189 U. S. 475, 47 L. Ed. 909 (1903).

There, it was contended for the first time when a case reached this Court, that the Court of Appeals lacked jurisdiction because the bill failed to mention threatened damage exceeding $2,000, and at that time it was required by statute that bills contain an allegation of damage in excess of $2,000 in order to obtain review by the Court of Appeals. The court held that since earlier cases had clearly estab-

lished that damage such as the petitioner was claiming could exceed $2,000, and since this minor defect could readily be removed by amendment of the bill, the court would overlook this trifle. Further support for the Court's action was found in an earlier case with an identical factual situation.

The jurisdictional question which Petitioner raises at this time is obviously of serious import and of far more significance than that raised in the *Giles* case. It is not a defect that can be cured by amendment, nor can it be overlooked. Its serious nature far outweighs any oversight Petitioner or the Court of Appeals for the Third Circuit may have been guilty of committing. *Zalznek* v. *Sias*, 248 F. 2d 234 (6th Cir., 1957); *Collier* v. *Piccard*, 237 F. 2d 234 (6th Cir., 1956).

III.—The Decision Below Contravenes the Principles heretofore established by the Decisions of other Circuit Courts of Appeal with respect to the Broad Discretion given to the trial judge to grant or deny a Motion for a new trial.

The petition for certiorari indicates Petitioner's concern, not only with the jurisdictional aspect of the Court of Appeals' review of the motion for a judgment n.o.v., and in the alternative for a new trial, but also with the new and far reaching classifications which the court abruptly established as a guide to future determinations in this area (Petition, page 3).

The dissenting opinion filed by Judge Hastie, which emphasizes this aspect of the decision is a succinct and accurate statement of Petitioner's position (Appendix, page A 18). Petitioner has also reviewed those cases cited in the majority opinion as establishing the criteria which the

trial court must follow in the exercise of its discretion, and respectfully questions whether such broad reliance as has been placed upon them is justified.

The far reaching import of the standards promulgated in this case is such that immediate consideration of it by this Court is required. In light of the broad discretion heretofore granted a trial court in this area, and in view of the great and immediate effect this decision will have, not only on the innumerable future motions that will be made under the provisions of Rule 59 (b), but also under Rule 59 of the Federal Rules of Civil Procedure, it would appear that this new determination should be promptly reviewed in order that the error into which we submit the Third Circuit has fallen should not lead to further confusion and uncertainty among the courts and the Bar of the Nation.

That this confusion exists, the Third Circuit itself admits in its opinion where it discusses the cases of *Miller* v. *Pacific Life Ins. Co.*, 17 F. R. D. 121, 125 (W. D. Mich. 1954), *American Cooler Co.* v. *Fay & Scott*, 20 F. Supp. 782, 783 (D. Me. 1937) and *United States* v. *15.40 Acres of Land*, 36 F. Supp. 535, 538 (N. D. Cal. 1940) (Pet. A-15), which it deems reflect a restrictive view of the trial judge's permissive discretion and then goes on to say:

> "But there is also some authority supporting an almost unlimited discretion in the trial judge in granting or denying a motion for a new trial. In Murphy *v.* United States District Court for the Northern District of California, Southern Division, 145 F. 2d 1018, 1020 (9 Cir. 1944), the Court of Appeals upheld the granting of a new trial by Judge Goodman in United States *v.* 1340 Acres of Land, *supra*. The appellate court found the trial judge's discretion in such matters was wider than did Judge Goodman himself. The appellate tribunal said that 'The granting of a new trial is discretionary with the

court and subject to no fixed rule except a consideration of what is just'. But the exception stated is itself a potent one. The case of Grayson v. Deal, 85 F. Supp. 431 (N. D. Ala. 1949), stands for the proposition that the court may consider the evidence as a whole and weigh it, and if it considers that the jury was mistaken or that its verdict was wrong, although supported by evidence, a new trial should be granted.

"What we have stated demonstrates that there is no consensus of opinion as to the exact standards to be used by a trial court in granting a new trial and that the criteria to be employed by an appellate tribunal charged with reviewing the trial judge's decision in this respect are equally indefinite. * * *" (Pet. A-16)

Advocacy of the less restrictive view is also to be found in Judge Lurton's opinion in *Mt. Adams & EP Inclined Railway Co.* v. *Lowery*, 74 Fed. 463, at 476-7 (6 Cir. 1896) and in the opinion of Judge Parker in *Garrison* v. *U. S.*, 62 Fed. 2d 41 (4th Cir. 1932), who said (p. 42):

"In addition to this, the trial judge should not hesitate to give the jury the benefit of his views as to the facts, leaving to them, however, the final determination of the issue. Then, if they return a verdict which in his opinion is clearly wrong, he should not hesitate to set it aside and grant a new trial."

We note the Third Circuit reference to "some authority" supporting an almost unlimited discretion in the trial judge. It is interesting to inquire how extensive the authority for the less restrictive view actually is.

In sharp contrast with the restrictive view of the scope of the trial court's power to grant a new trial established

by the court below, we have the rule long ago laid down by the English courts which has been followed by the Fourth Circuit. An admirable analysis of it is found in Judge Parker's opinion in *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F. 2d, 350 (1941). He there quotes from Justice Mitchell of the Pennsylvania Supreme Court in *Smith* v. *Times Pub., etc.*, 178 Pa. 481, 36 296 (1897):

> "The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion, without which the jury system would be a capricious and intolerable tyranny, which no people could long endure. This court has had occasion more than once recently to say that it was a power the courts ought to exercise unflinchingly."

and from Mr. Justice Williams' opinion in the same case:

> "'Trial by jury' therefore meant, at the time of Magna Charta, the investigation and decision of an issue of fact between parties litigant by 12 men, sitting as jurors, under the advice and legal direction of a law judge. When the verdict is rendered by the jury, it is to the court of which they are a part. It is recorded upon the minutes of the court, and becomes a part of the record of the trial; but it does not thereby become a judgment of the court, unless the judge is satisfied with it, and specially or by general order or rule so directs. He has a responsibility for the result no less than the jury, for it is his duty to see that right and justice are done, so far as this may be practicable in the particular case.

If he is not satisfied with the verdict, it is his duty to set it aside, and grant a new trial before another jury. This was the settled practice in England as early as 1665. Forsyth, Jury Tr. 164. Lord Holt states that the practice of granting new trials, as a means of correcting the mistakes and relieving against the misconduct of juries, was in use much earlier than 1665, but accounts for its exercise not appearing in the books for the reason that, prior to that date, the action of the courts upon motions was not reported.

* * * * * *

"As early, therefore, as 1665, the courts at Westminster did precisely what we have done in this case, and for the same reason. The right of trial by jury was not then supposed to give to a successful party the right to insist on an advantage due to the mistake or the willful misconduct of the jury, no matter how grossly unjust and oppressive the result might be; but the supervisory control of the court in banc, sitting as a court of review, was promptly exercised to relieve against the miscarriage of justice. The exercise of this power was then thought to be in aid of trial by jury. Lord Mansfield, in Bright *v.* Eynon, 1 Burrows, 390, described the effect of thus granting a new trial as 'no more than having the cause more deliberately considered by another jury, when there is reasonable doubt, or perhaps a certainty, that justice has not been done.' The function of the jury was well defined by Chief Justice Holt in Ash *v.* Ash, Holt, 701, nearly 100 years before the Declaration of Independence: 'The jury are to try the cause with the assistance of the judge.' They are not, and have never been, independent of the court of which they are a part, but their verdicts must meet the approval, or at least they must not offend the sense of justice, of the presiding judge, who, as the late Justice Grier, of the supreme court of the United States, was

> fond of saying, was by virtue of his position 'the thirteenth juror.'"

and also from Lord Mansfield in *Bright* v. *Eynon*, 1 Burr. 390 (1757):

> "Trials by jury in civil causes, could not subsist now without a power, somewhere, to grant new trials. * * * There are numberless causes of false verdicts, without corruption or bad intention of the jurors. They may have heard too much of the matter before the trial; and imbibed prejudices without knowing it. The cause may be intricate: the examination may be so long as to distract and confound their attention. Most general verdicts include legal consequences as well as propositions of fact: in drawing these consequences the jury may mistake, and infer directly contrary to law. The parties may be surprised by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should, upon many occasions be opportunities of reconsidering the cause by a new trial."

The Third Circuit, after classifying and sub-classifying the grounds upon which new trials may be granted, finally arrives at the conclusion that where the litigation deals with material which is familiar and simple, it is not necessary for the trial judge to scrutinize the evidence as closely as he otherwise would. In this situation, according to their view the Judge commits an abuse of discretion if he substitutes his judgment on the veracity of the witnesses for that of the jury.

Applying the theory of the Third Circuit to a "simple" automobile case where the defendant's car, going at excessive speed, mounts a sidewalk and strikes the plaintiff, if a jury in such a situation should render a verdict for the defendant the trial judge would have no power to disturb its findings.

Thus, the issue is clearly posed. Is the trial judge to be restricted by artificial rules which limit and hamper the exercise of his discretion as the Third Circuit would have it; or is he to continue to fulfill his office as he has down through the centuries, bringing to bear the wisdom and experience gained upon the bench as a check on the jury which may be misled or confused and retaining full discretion to submit the case to a new tribunal when in his sound judgment such a course is required?

Respectfully submitted,

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